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BY THE

THE CIRCUIT COURT OF THE UNITED STATES

BOSTON TERM 1940

508

PLAINTIFFS

STATE OF MASSACHUSETTS - THROUGH THE UN-
EMPLOYMENT COMPENSATION COMMISSION
AND HORACE DRIEHL, TREASURER. Petitioner

vs.

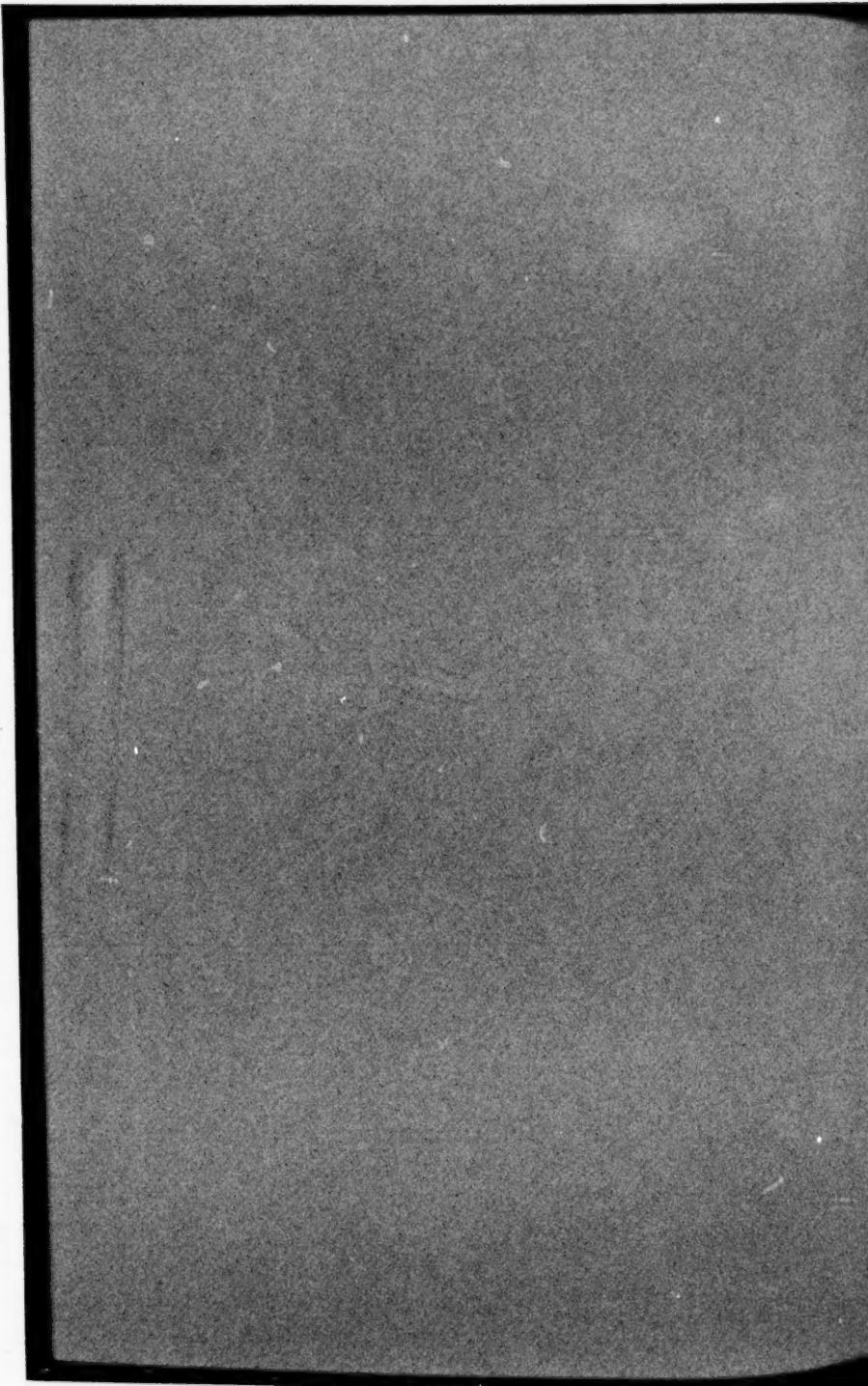
MURRAY WRIGHT, TRUSTEE IN BANKRUPTCY
FOR THE STATE OF MASSACHUSETTS. Respondent. All

HARRY G. WALDRON, Jr.

Chief Counsel.

WMA HOWARD

Associate Counsel.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939.

NO.

In Bankruptcy

STATE OF MISSOURI BY AND THROUGH THE UN-
EMPLOYMENT COMPENSATION COMMISSION
AND HARRY P. DRISLER, TREASURER, *Petitioner*
and Appellant below,

vs.

WARREN S. EARHART, TRUSTEE IN BANKRUPTCY
FOR BURNAP-MEYER, INC., *Respondent and Ap-*
pellee below.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT, AND BRIEF IN SUPPORT
THEREOF.**

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Chief Counsel,

VIVA HUNT,
Assistant Counsel,
For Petitioner.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939.

NO.

In Bankruptcy

STATE OF MISSOURI BY AND THROUGH THE UNEMPLOYMENT COMPENSATION COMMISSION AND HARRY P. DRISLER, TREASURER, *Petitioner and Appellant below,*

vs.

WARREN S. EARHART, TRUSTEE IN BANKRUPTCY FOR BURNAP-MEYER, INC., *Respondent and Appellee below.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows to this Honorable Court:

I.

Summary and Statement of the Matter Involved.

1. That your petitioner is aggrieved by the final opinion and decision of the United States Circuit Court of Appeals for the Eighth Circuit, entered on the 2nd day of May, 1940, in the cause entitled State of Missouri, By and Through the Unemployment Compensation Commission and Harry P. Drisler, Appellants, vs. Warren S. Earhart, Trustee in Bankruptcy for Burnap-Meyer, Inc., Appellee.

2. The important questions before that Court, which were decided adversely to the contention of the petitioner were:

a. Can the trustee for Burnap-Meyer, Inc., which filed a petition for corporate reorganization in December 1936 and operated under owner-management from December 13, 1936, until April 14, 1938, and which was liable both for taxes under Title IX of the Federal Social Security Act for the years 1936, 1937 and 1938 and for contributions under the Missouri Unemployment Compensation Law for the years 1937 and 1938, be heard to claim that contributions based upon wages payable for the period beginning January 1, 1937 and ending June 16, 1937 are not due, on the ground that the Missouri Unemployment Compensation Law, which was approved June 17, 1937, is unconstitutional in that it violates Article II, Section 15 of the Missouri Constitution prohibiting the General Assembly from passing a law retrospective in its operation, when Section 902 (a) (3) of the Social Security Act, quoted at p. 15, provides for the allowance of credit against the federal tax up to 90% for the amount of contributions paid into an unemployment fund under an approved state law and when, if the company discharges its duty and complies with Federal and State laws, the tax obligation will not be increased?

b. Should effect be given to Section 6 (C) (d) of the Missouri Unemployment Compensation Law which specifically levies a tax in addition to any other tax levied by the Act so that the actual tax payment due Missouri for any part of a given year must equal 90% of the tax levied under Title IX of the Federal Social Security Act?

c. Should the Court have ordered the trustee to pay contributions due under the Missouri Unemployment Compensation Law in view of the fact that Section 124a, Title 28, U. S. C. A. (quoted at p. 16) provides that a trustee shall be subject to all state and local taxes applicable to a business the same as if the business were conducted by an individual or corporation?

d. Should the Court order the payment of interest on delinquent contributions as provided in the Unemployment Compensation Law when the contributions accrue during the time the company is in the process of reorganization and the business is being operated under the supervision of the Federal Court?

e. Are contributions, which are due under the Missouri Unemployment Compensation Law, taxes within the meaning of the Bankruptcy Act?

3. The facts which gave rise to the foregoing questions were these:

An involuntary petition in bankruptcy was filed against Burnap-Meyer, Inc., in the United States District Court for the Western Division of the Western District of Missouri on November 12, 1936. Answer and petition of the Company for reorganization under Section 77B of the Bankruptcy Act was filed and approved December 13, 1936. Owner-management was granted debtor, which continued until April 14, 1938, when a temporary trustee was appointed (Tr. 1-2).

On May 23, 1938, a final order of liquidation was entered, the property was ordered sold, and the case was referred to the Referee. The amount realized from the sale of the property is insufficient to pay the claims which arose during the period of owner-management and which were all allowed as administrative expenses (Tr. 2).

The Federal Social Security Law was passed August 14, 1935. Burnap-Meyer, Inc. was liable under the Federal Act for taxes based upon wages payable to its employees for the years 1936, 1937 and 1938. Under the provisions of Title IX of the Federal Act, an employer was entitled to credit against the federal tax, up to 90% thereof, the taxes which he paid to a state fund under an approved state unemployment Compensation law, provided state contributions were paid before the time set out for the filing of the Federal return (Tr. 4; Federal Social Security Act, Section 902, quoted at page 15).

Missouri had no unemployment compensation law during the year 1936. Therefore, Burnap-Meyer, Inc. became indebted to the Federal Government for the entire amount of the tax levied under Title IX of the Federal Act for that year. On June 17, 1937, the Missouri Unemployment Compensation Law was enacted (Laws of Missouri, 1937, pp. 574-603). This Law was approved by the Social Security Board on July 13, 1937. By its terms on and after January 1, 1937, contributions were to accrue and become payable by each employer for each calendar year in which he was subject to the Act with respect to wages payable for employment occurring during such calendar year (Section 6 A (1), Unemployment Compensation Law, quoted at page 16). Burnap-

Meyer, Inc. became liable for contributions with respect to wages payable for employment during the year 1937. Burnap-Meyer, Inc. knew that, if it paid contributions due under the State Law prior to January 31, 1938, said contributions could be credited against the Federal tax and that its tax obligation would not be increased. (Social Security Act, Section 902, quoted at p. 15.)

Burnap-Meyer, Inc. did not pay any contributions which became due under the Missouri Unemployment Compensation Law. It did not pay any taxes which became due under Title IX of the Federal Act for the year 1937.

On June 13, 1938, the petitioner filed a claim against the bankrupt estate for contributions accruing under the Act for the period from January 1, 1937 to April 14, 1938, in the amount of \$1,559.26, with interest at 1% per month on payments from their due dates under the Act (Tr. 3, Ex. A, Tr. 7-10). The claim was computed upon wages payable for the entire year 1937 at the rate of 1.8%, the rate required for the year 1937, and from January 1, 1938 until April 14, 1938 at the rate of 2.7%, the rate required for the year 1938. (Laws of Missouri, 1937, p. 585.) Contributions claimed for the year 1937 amounted to \$1,123.03; those for the year 1938 amounted to \$436.23 (Tr. 4).

On May 12, 1938, Dan M. Nee, Collector of Internal Revenue, filed a claim for taxes due the United States in the amount of \$397.20, \$272.48 being for taxes due under Title VIII of the Federal Social Security Act and \$124.78 being for taxes due under Title IX (Tr. 4, Ex. D, Tr. 15-16). \$124.78 is the exact amount which should have been paid to the Federal Government under Title IX if contributions required under the Missouri Law had been paid and if credit had been received. \$124.78 is the 10% of \$1,247.81 which the Federal Government should have claimed and which the Referee should have allowed. The \$1,123.03 claimed by the petitioner for the year 1937 is the 90% of the Federal tax for which Burnap-Meyer would have been allowed credit against the Federal tax if it had been paid when due. On October 27, 1938, the Collector of Internal Revenue filed an amended claim, in which he asked for taxes under Title IX in the amount of \$1,247.81, or 100% rather than 10% of the tax required (Tr. 4, Ex. G. Tr. 19-21).

Two other claims were filed by the Collector of Internal Revenue, one in the amount of \$34.75 for taxes due under Title VIII for the second quarter of the year 1938 (Tr. 4, Ex. E, Tr. 16-17); the other in the amount of \$107.12, \$54.30 being for taxes due under Title IX for the year 1938 and \$52.82 being for taxes due under Title VIII for the second quarter of the year 1938 (Tr. 4, Ex. F, Tr. 18-19). No one has been able to explain why the Federal Government claimed only \$54.30 under Title IX for the year 1938. Perhaps this too was only 10% of the amount which should have been claimed.

Interest was also claimed on the amounts set out in these claims.

The claims filed for taxes under Title VIII have no bearing on this case except the part they may play in helping the court to determine just why the Referee, on February 28, 1939, made an order allowing all of these four claims, which total \$2,059.42 in the sum of only \$564.58 (Tr. 4, Ex. H., Tr. 21). All amounts claimed under Title VIII, plus the \$54.30 (Ex. F, Tr. 18-19), claimed for the year 1938 under Title IX plus 10% of the amount claimed under Title IX in the amended claim (Ex. G, Tr. 19-21) would total \$539.13. The petitioner presumes that the amount allowed was calculated in this manner and that the difference between \$539.13 and \$564.58 was interest. At any rate, taxes were claimed under Title IX for the year 1937 in the amount of \$1,247.81. Only \$564.58 was paid under both Titles VIII and IX for both years 1937 and 1938. It is evident that the Court allowed the tax as if credit had been granted for contributions paid under the Missouri Unemployment Compensation Law. The Federal Government did not appeal (Tr. 5), presumably because it felt that contributions would be paid under the State law and credit would be extended or perhaps because it felt it could collect the 90% later if the State tax was not paid.

The trustee filed objections to the claim of the petitioner claiming that (1) contributions payable under the Missouri Unemployment Compensation Law are not taxes within the meaning of Section 64 A. (4) of the Chandler Act; (2) that they are not considered as taxes by the State of Missouri; (3) that contributions accruing on wages payable for the period prior to June 17, 1937 should not be allowed; (4) that the petitioner's claim should not be given priority over other

administrative expenses; (5) that the claim should not be allowed in any sum (Tr. 5, Ex. C, Tr. 11-15).

Hearing was held before the Referee on the trustee's objections (Tr. 5). The petitioner contended that contributions exacted under the Missouri Unemployment Compensation Law are taxes and are entitled to the priority allowed to taxes under the bankruptcy act; and that, since the Federal Government would compel the trustee to pay the full 100% of the tax due under Title IX to the Collector of Internal Revenue if 90% were not paid to the State of Missouri, the trustee was not injured in that the amount of the tax which he would necessarily have to pay would not be increased and therefore was not in a position to claim that the Missouri Law was retrospective in operation and therefore unconstitutional.

The Referee ignored the fact that he had ordered only 10% of the amount due under Title IX to be paid and held that, since the Missouri Law was not approved until June 17, 1937, the petitioner is not entitled to claim or recover for any contributions alleged to be due it covering any period prior to that date (Tr. 5, Ex. I, Tr. 21-23). By his order of February 28, 1939 (Ex. H, Tr. 21), the Referee failed to allow the Federal Government more than 10% of the tax due for the year 1937. By his order in respect to the petitioner's claim, he failed to order the payment of any taxes to the State of Missouri for the period beginning January 1, 1937 and ending June 16, 1937. In other words the Referee exempted the bankrupt from the payment of 90% of the amount of taxes it should have paid for this period.

The Referee held that such contributions as may be allowed under the Unemployment Compensation Law do not constitute a tax and refused to allow them as such. The order further found that (1) it is practicable to determine the estate's liability under the Chandler Act, which fact the petitioner has never questioned, (2) that contributions accruing from June 17, 1937 to December 31, 1937 in the amount of \$592.94 and from January 1, 1938 until April 14, 1938 in the sum of \$436.23, making a total of \$1,029.17, should be paid; and that this amount should be paid as an administrative expense on a parity with all other claims arising during the period of owner-management. No interest was allowed.

A petition for review was filed; the court affirmed the order of the Referee (Tr. 6, Ex. J, Ex. K, Tr. 24-27); and the peti-

tioner appealed to the United States Circuit Court of Appeals, Eighth Circuit (Tr. 6, Ex. L, Tr. 27-28).

Upon its petition for review and in its assignment of errors (Tr. 6, Ex. M, Tr. 28-29), in addition to the above mentioned arguments made before the Referee, the petitioner further contended (1) that interest should have been allowed and (2) that, if the Court should find that contributions based upon wages payable for the year 1937 prior to June 17, should not be paid, that effect should be given to Section 6 (C) (d) (Appendix p. 40), which specifically levies a tax in addition to any other tax levied by the Act so that the actual payment due Missouri must equal 90% of the tax levied under Title IX of the Federal Social Security Act.

On August 10, 1939, the Social Security Act was amended, which fact, the petitioner maintains strengthened its contention that the bankrupt's tax burden would not be increased by paying contributions to the State of Missouri based upon wages payable for the entire year 1937, and, therefore, the trustee cannot be heard to say he is injured and that the Missouri Law is unconstitutional. The original Social Security Act provided for credit if contributions were paid to a state prior to the date for filing the return under Title IX (Section 902, Social Security Act, quoted at page 15). Conflicting decisions were being handed down by various federal district courts, some courts holding that bankrupts which were not able to pay the State tax when due should not be given the benefit of the credit allowance, and, therefore, the entire amount of taxes claimed both by the Federal Government and the State would have to be paid, other courts holding that if credit were not allowed, the 90% credit which would normally be allowed amounted to a penalty, which was prohibited by the Bankruptcy Act, and, therefore, could not be collected by the Federal Government. Congress, realizing that credit should be allowed, amended Section 902 to provide for the allowance of credit for the years 1936, 1937 and 1938 for the amount of contributions paid into an unemployment fund under a State law *regardless of the date of payment* provided the assets of the taxpayer were under the control of the Court at any time during the fifty-nine-day period following the enactment (Section 902 (a) (3), quoted at page 15). The assets of Burnap-Meyer, Inc. were under the control of the Court during that

period. Therefore, the allowance of credit is assured regardless of the time of payment to the State.

Not only the Referee and the District Court, but also the United States Circuit Court of Appeals, Eighth Circuit, ignored the fact that taxes should be paid either to the Federal Government or the State of Missouri and the fact that the decision of the lower court had exempted the bankrupt from taxation and made the following findings to which the petitioner takes exception: (1) that the collection of contributions for the period prior to the approval of the law is forbidden by Article II, Section 15 of the Missouri Constitution prohibiting the General Assembly to pass laws retrospective in operation; (2) that the Federal Government did not file an appeal and therefore cannot collect the additional 90% of its tax claim even though that amount is never paid to the State, and, therefore, that the estate is injured and is in a position to raise the constitutional question; (3) that Section 6 (C) (d) is subject to the same constitutional objections; (4) that after property passes into the hands of the Court, interest on claims is not allowable against the estate where the assets are inadequate to pay the amount of the claims allowed as costs of administration; (5) that it is unnecessary in this case to determine whether or not contributions are taxes. Contributions which became due after June 17, 1938⁷ were allowed as an administrative expense (Tr. 32-40).

The petitioner was aggrieved by this decision and filed its petition for rehearing (Tr. 41-48). The same was denied on May 24, 1940 (Tr. 49).

On motion of petitioner, an order was made on June 6, 1940 staying the issuance of the mandate for a period of 30 days to permit petitioner to apply for this writ (Tr. 50). On July 2nd, an order was made further staying the issuance of the mandate for an additional thirty days.

II.

Reasons Relied on for the Allowance of the Writ.

1. The United States Circuit Court of Appeals in holding that taxes are due neither to the Federal Government under Title IX of the Social Security Act nor to the State of Missouri under the Unemployment Compensation Law, in exempting the bankrupt from taxation and in sanctioning an erroneous

order of a lower court has destroyed the unitary plan for unemployment relief which Congress visualized when it passed the Social Security Act and invited the states to tax the same classes of employers and has so far departed from the accepted and usual course of judicial proceedings in respect to social security legislation as to call for an exercise of this court's power of supervision.

2. The United States Circuit Court of Appeals by its decision, has authorized the trustee to ignore Section 124a, Title 28, U. S. C. A., which said statute should be construed by this court as it applies to Unemployment Compensation contributions in order that a general principle may be established which may be followed by all courts in handling estates.

3. The United States Circuit Court of Appeals in holding that the Missouri Unemployment Compensation Law, which is a coordinated part of a great national network of social security legislation made up from both Federal and State laws and which was passed at the invitation of Congress, is unconstitutional and in refusing to give effect to Section 6 (C) (d) handed down an erroneous and unpredicted decision based upon an alleged hardship in one particular, unexpected and peculiar situation brought about by an erroneous order of a referee, and has ignored the fact that in the general line of cases the State and Federal laws operate together and no hardship results. In handing down this decision the Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court.

4. The Court in refusing to decide whether or not contributions exacted under the Missouri Unemployment Compensation Law are taxes, which question was raised by the trustee's objections and was passed upon by the Referee and the District Court, merely because a determination of this question is not necessary in the instant case for the allowance of the principal amount of the claim since all contributions accrued during owner-management and therefore fall under the classification of administrative expenses, has, in effect, sanctioned the decision of the lower court that said contributions are not taxes and has left to the lower courts the authority to order the payment of all claims for contributions accruing prior to the date of bankruptcy which may arise in the

future or which are now pending to be paid as general claims instead of tax claims, therefore depriving them of their priority under the Bankruptcy Act. The question as to whether or not contributions exacted by the Missouri Law should be given the priority allowed to taxes under the Bankruptcy Act has not been, but should be, settled by this Court.

5. In failing to allow interest, the Court has decided a federal question in a way in conflict with applicable decisions of this Court.

6. In refusing to pass upon the question of whether or not contributions are taxes, the Circuit Court of Appeals has indicated its approval of a decision of a lower court which is probably in conflict with applicable local decisions.

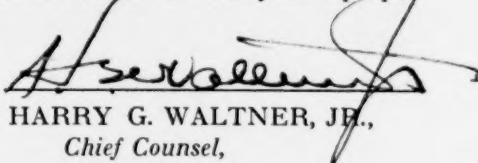
7. The Circuit Court of Appeals, in holding that contributions cannot be collected for the period beginning January 1, 1937 and ending June 17, 1937 has paved the way for all employers liable for that period to demand a refund of contributions paid. It is imperative that the Unemployment Compensation Commission of Missouri have a ruling from the court of highest authority before acting on such applications for refund.

III.

Prayer for Writ.

Wherefore, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of State of Missouri By and Through the Unemployment Compensation Commission and Harry P. Drisler, Treasurer, Appellants vs. Warren S. Earhart, Trustee in Bankruptcy for Burnap-Meyer, Inc., Appellee, No. 11596, to the end that this cause may be reviewed and determined

by this Court as provided for in the statutes of the United States; and that the findings of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.



HARRY G. WALTNER, JR.,
Chief Counsel,



Viva Hunt
VIVA HUNT,
Assistant Counsel,
For Petitioner.